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Sent: Friday, April 24, 2009 11:18 AM
To: ROBERTS, DAVID (DNR); PALAZZI, DAVID (DNR)
Cc: Leroy Deardorff; Alan Chapman; Merle Jefferson Sr.; Randy Kinley Sr.; Lena A. Tso; Harlan James; Elden Hillaire; Bernard Thomas
Subject: LNR Comments on April 2009 DNR Cherry Point Resource Protection and Management Plan

David,

Pursuant to your April 5, 2009 email and my discussions/coordination with Alan Chapman, I have given a limited review of the April 2009 DNR Cherry Point Resource Protection and Management Plan. Providing three weeks for review of essentially a new document (when compared to the previously reviewed June 2008 version) was not adequate due to competing work load priorities and vacation time. In addition, providing the draft in PDF format without line numbers makes it cumbersome to provide comments. As a result, I will use page numbers and try to describe the location of needed edits.

My comments are presented below. I have not had an opportunity to review these comments with LNR policy staff - these comments reflect my understanding of Lummi policy and perspectives. Please make the following changes:

1) Although much improved over the June 2008 version in terms of grammar and spelling, I suggest that the entire document be proof read by a technical writer to correct spelling errors (e.g., the Fraser River rather than Frazer - pg 18, oversight rather than over-site on pg 142), missing words (e.g., the word "the" is missing in numerous places before the words "Cherry Point Resource Area"), words appearing out of order (see in particular pg. 140), consistent and accurate references to the industries (e.g., should be Alcoa-Intalco Works rather than Intalco Aluminum Corporation), internal consistency (industries operating since 1950s, not 1960s - see pg 30), definitions (e.g., MLLW = Mean Lower Low Water on pg 35). In the remaining comments, I have not identified other editorial or style changes that would improve the document.

2) In the acknowledgements section (page i), change Alan Chapman's affiliation from "The Lummi Nation" to "Lummi Natural Resources Department". You probably want to confirm the other identified affiliations in the list as I noted some other inaccuracies.

3) Page 10, Section 1.1.1. Add a new sentence at the end of the paragraph that starts, "Before 1971...." that includes the following text, "Tidelands along Indian Reservations were reserved for the exclusive use of the associated Indian tribes prior to statehood and were never tidelands managed by the state." This qualifier statement is consistent with court rulings and is needed to balance the state claims to ownership over "all" tidelands in Washington.

4) Page 11, Section 1.1.1. Add the words, "intergovernmental agreements," after the word "Treaties" in the last paragraph of this section. This addition is to identify the Centennial Accord that is referenced later.

5) Page 11, Section 1.1.2. This comment applies to the entire document but first appears in the last paragraph of this section on this page. The fundamental issue is how the words "agencies" and "resource agencies" are used throughout the document. The words are typically presented in a manner similar to, "various agencies, tribes, and interest groups" or "resource agencies, tribes, and the county" or "agencies, county, and tribes" throughout the document. The Lummi Natural Resources Department and the Lummi Cultural Resources Department are resource agencies. I suggest that you define "resource management agencies" early in the document as, "federal, tribal, state, and local government resource management agencies (e.g., Corps of Engineers, Environmental Protection Agency, U.S. Fish and Wildlife Services, NOAA Fisheries,

Lummi Natural Resources Department, Lummi Cultural Resources Department, Washington Department of Ecology, Washington Department of Fish and Wildlife, Washington Department of Natural Resources, Whatcom County Planning and Development Services Department, Whatcom County Public Works Department)" and then use this term (i.e., "resource management agencies") consistently throughout the document.

6) Page 18, fourth paragraph. Modify the sentence that starts with the words "Offshore areas have...." to read, "Offshore areas have traditionally been used for tribal commercial, ceremonial, and subsistence harvests of numerous species....". Also modify the subsequent sentence to read as follows, "Docks and other hardened structures impact currents and tidal action and preclude and/or interfere with the exercise of tribal treaty rights to fish in this area."

7) Page 19, Section 1.2.1. Need to add the water depth criteria for establishing the waterward boundary of the Cherry Point Resource Area (i.e., it is not just a 5,000 feet distance from the marine shoreline).

8) Page 20, Section 1.4. In the lead sentence for the list of objectives, use the words, "Cherry Point Resource Protection and Management Plan" rather than "Cherry Point Plan". Isn't one of the objectives of this plan to ensure that there is a sustainable harvestable surplus of finfish and shellfish as protected by Indian treaties and also to ensure successful and sustainable economic development activities within the area zoned for Heavy Impact Industrial Uses? Why aren't these two objectives explicitly stated?

9) Page 20, Section 1.4 and Page 126, Section 7. Replace the use of the word "baseline" with a more accurate descriptor such as "current conditions". From the tribal perspective, "baseline ecological conditions" or "baseline conditions" are the conditions that existed prior to the arrival of euro Americans. For the Cherry Point area, the "baseline" is the condition that existed prior to the construction and operation of the three existing docks and the other structures along the shoreline and the introduction of storm water and other discharges from the industries and surrounding land uses.

10) Page 24, Section 2.2.2. Table 2. As presented, the timeline of major events at Cherry Point suggests that the history of land use in the Cherry Point Resource Area started in 1954. This is simply not accurate and the additions below need to be added to clarify that this area was used by Indians for commercial, ceremonial, and subsistence purposes long before statehood and any other development in this area and this "first in time" stature and treaties affect the land use in this area to this day. Note that I made these comments on the June 2008 draft and they were not incorporated. The following rows should be added to the beginning of Table 2.

Date: Time Immemorial

Event: Ceremonial, subsistence, and commercial harvest of finfish and shellfish and other commerce by Native American Indians

Type: Federal/Tribal law

Date: 1855

Event: Treaty of Point Elliot signed

Type: Federal/Tribal law

Date: 1889

Event: Washington Statehood

Type: Federal/State law

The following other additions should also be added to this table as they substantially affect the management of the Cherry Point Resources Area:

Date: 1976

Event: Final Decision of *United States v. Washington* (384 F. Supp. 312, 377 [W.D. Wash. 1974], aff'd, 520 F.2d 676 [9th Cir. 1975], cert. Denied, 423 U.S. 1086 [1976])

Type: Federal/State/Tribal law

Date: 1989

Event: Centennial Accord signed

Type: Intergovernmental Agreement

Date: 1996

Event: Decision in *Northwest Seafarms v. US Army COE*, 931 F.Supp. 1515 (WD WA 1996),

Type: Federal/Tribal law

Date: 1998

Event: Executive Order 13084 issued by the White House, Consultation and Coordination with Indian Tribal Governments

Type: Federal law

11) Page 26, Section 3.1.1. As written, the first sentence of this section incorrectly suggests that the State of Washington is a co-manager of cultural and natural resources on Reservation lands. The following change should be made to this sentence, ".... Usual and Accustomed areas. Tribes are the sole managers of cultural and natural resources on their Reservation lands."

12) Page 26, Section 3.1.1. The following sentence should be added to the end of the first paragraph of this section, "In addition, pursuant to numerous court rulings and Presidential Executive Orders, all federal agencies are required to consult with affected Indian tribes in a government-to-government manner and ensure that impacts to tribal treaty rights are avoided and/or minimized and any unavoidable impacts are mitigated to the satisfaction of the affected tribal governments."

13) Page 26, Section 3.1.1. The word "fishing" should be added to the list of treaty-protected activities in the second sentence of the second paragraph.

14) Page 27, Section 3.1.2.2, Second sentence should be revised as follows, " Like all.....tribal governments and must ensure that the tribal trust resources are protected prior to taking....including fishing and cultural or traditional cultural properties."

15) Page 28, Section 3.1.2.8. First sentence should be revised to read, "The Department of Fish and Wildlife are co-managers with tribal governments and contribute to the management of commercial and recreational finfish and shellfish harvesting."

16) Section 7, starting on page 126. See comment #9 above regarding the use of the word "Baseline" on page 126. The list of cooperators for the various management actions is incomplete in many areas. Please revisit the identified cooperators. In general, the Cherry Point Industries should be identified as cooperators for many of the water quality management actions (and should also be identified as such rather than using the word "dischargers"); affected tribes should be included as cooperators for several of the actions also - particularly for the vessel traffic and spill risk management section.

17) The Glossary should be given a better review and corrected. As examples of needed changes, Page 147. The definition given for Extreme High Water is actually the definition for Mean Higher High Water. On Page 148, the definition for Ordinary high water states that in the absence of vegetation, it is the line of mean high water - this is not accurate, in the absence of

vegetation, it is mean higher high water. On Page 149, the definition of "runoff" is not aligned with any definition that I have ever seen.

18) Page 174, following the first paragraph in the section on the Lummi Nation, the following text should be inserted, "The existing piers and associated vessel traffic preclude and/or interfere with the ability of Lummi tribal members to exercise their treaty-protected rights to fish."

19) Page 175. The Section title should be changed from "European History" to "Euro-American History"

20) Page 179. Need to describe the water dependency of the Alco-Intalco Works facility.

Please call with any questions.

Kind Regards,
Jeremy